Bank Pembangunan (M) Bhd v Elgi Marka Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING-UP) NO D5-28-60 OF 1996
KAMALANATHAN RATNAM JC
29 MAY 1997

Companies and Corporations — *Winding up — Inability to pay debts — Winding up petition founded on default judgment obtained — Company impecunious and truly and clearly unable to pay debt — No cross-claim or counterclaim — Whether just and equitable that company be wound up — Companies Act 1965 s 218(1)(e) & (i)*

The petitioner had granted loan facilities to the respondent and the respondent had failed to repay the loan amounting to RM4m. The petitioner entered judgment in default against the respondent. The statutory notice of demand had been duly delivered to the respondent but there had been no response. This present petition for winding up was filed grounded on s 218(1)(e) and (i) of the Companies Act 1965 ('the Act') on the basis of the respondent's inability to pay its debts due to the petitioner, and that therefore it was just and equitable that it be wound up. Earlier, the petitioner had filed a winding-up petition against the respondent ('the D2 petition') which was dismissed with liberty to file afresh. The petitioner had also filed an originating summons ('the originating summons') for a declaration that it was entitled to sell off the machinery belonging to the respondent but charged to the petitioner. The judge ordered that the proceeds of sale to be deposited with the petitioner's solicitors as stakeholders and the originating summons be heard on its merit. The issues before the court were whether: (i) the respondent was unable to pay its debt and that it is just and equitable that it be wound up; (ii) the D2 petition had the effect of estopping the petitioner from filing the present petition on the ground of res judicata; and (iii) the originating summons had any effect on the present petition.

Held, ordering that the respondent be wound up:

(1) Since there had been no response from the respondent, it followed that there was a presumption of inability to settle the judgment by the respondent pursuant to the statutory notice. Alternatively, s 218(2)(c) of the Act allows the petitioner to show as an alternative the presumption raised by the statutory notice of demand pursuant to s 218(2)(a) that on the evidence presented, the respondent company was unable to pay its debt. In all the like circumstances, the court was satisfied that respondent was impecunious and truly and clearly unable to pay its debt and that it was just and equitable that it be wound up. The petitioner was seized of a valid and enforceable judgment against the respondent for RM4m and this judgment had not been set aside nor appealed against. There was at present no existing cross-claim against the petitioner. In the originating summons, it was the petitioner who

was making the application and there was no counterclaim or cross-claim by the respondent in those proceedings. The respondent's argument that it had not as yet taxed the costs of the striking out of the earlier D2 petition was neither here nor there. Since the costs had not been taxed, the court could not consider this even remotely as a cross-claim. Even on a successful taxation, the costs could never reach the figure in the judgment sum. Having reached the conclusion that the respondent was unable to pay its debts, it was unnecessary to consider the allegation that the debt was in dispute. In any case, the court had considered the allegations and rejected all such claims (see pp 507E–F, 508A, 509H–I and 510C–E).

(2) Clearly, the petitioner had been given the liberty to file afresh and which it had done by way of this petition (see p 508D).

(3) The decision of the judge in the originating summons would not in any way affect the present petition. In any event, even if a winding-up order was made, the respondent could continue the originating summons through the provisional liquidators (see p 509G).

[Bahasa Malaysia summary

Pempetisyen telah memberikan kemudahan pinjaman kepada penentang dan penentang telah gagal membayar balik pinjaman sebanyak RM4 juta. Pempetisyen memasukkan penghakiman ingkar terhadap penentang. Notis tuntutan statutori telah pun disampaikan kepada penentang seperti yang sepatutnya tetapi tiada jawapan. Petisyen ini untuk penggulungan difailkan berdasarkan s 218(1)(e) dan (i) Akta Syarikat 1965 ('Akta tersebut') berasaskan ketidakmampuan penentang untuk membayar hutang-hutangnya kepada pempetisyen, dan bahawa adalah adil dan saksama ianya digulung. Lebih awalnya, pempetisyen telah memfailkan satu petisyen penggulungan terhadap penentang ('petisyen D2') yang ditolak dengan kebebasan untuk memfailkan semula. Pempetisyen juga telah memfailkan satu saman pemula ('saman pemula tersebut') untuk satu perisytiharan bahawa ia berhak menjual jentera kepunyaan penentang tetapi yang digadaikan kepada pempetisyen. Hakim memerintahkan bahawa hasil jualan didepositkan dengan peguamcara pempetisyen sebagai pemegang amanah harta dan saman pemula tersebut didengar atas meritnya. Isu-isu di hadapan mahkamah adalah sama ada: (i) penentang tidak mampu membayar hutangnya dan bahawa adalah adil dan saksama ianya digulung; (ii) petisyen D2 mempunyai kesan mengestop pempetisyen daripada memfailkan petisyen ini berdasarkan alasan res judicata; dan (iii) saman pemula tersebut mempunyai sebarang kesan atas petisyen ini.

Diputuskan, memerintahkan supaya penentang digulung:

(1) Oleh kerana tiada jawapan telah diterima daripada penentang, ini bermakna bahawa terdapat anggapan ketidakmampuan

menyelesaikan penghakiman oleh penentang menurut notis statutori. Secara alternatif, s 218(2)(c) Akta tersebut membenarkan pempetisyen menunjukkan sebagai alternatif anggapan yang dibangkitkan oleh notis tuntutan statutori menurut s 218(2)(a) bahawa berdasarkan keterangan yang dikemukakan, syarikat penentang tidak mampu membayar hutangnya. Dalam kesemua keadaan yang serupa, mahkamah berpuas hati bahawa penentang tidak berwang dan benar-benar dan jelas tidak mampu membayar hutangnya dan bahawa adalah adil dan saksama ianya digulung. Pempetisyen mengetahui penghakiman yang sah dan boleh dikuatkuasakan terhadap penentang untuk jumlah RM4 juta dan penghakiman ini tidak pun diketepikan atau dirayu. Buat masa ini tiada tuntutan balas yang wujud terhadap pempetisyen. Dalam saman pemula tersebut, ia merupakan pempetisyen yang membuat permohonan dan tiada tuntutan balas oleh penentang dalam prosiding itu. Hujah penentang bahawa ia belum lagi mencukai kos pembatalan petisyen D2 yang lebih awal tidak kena-mengena. Oleh kerana kos belum dicukai, mahkamah tidak boleh mempertimbangkannya sebagai tuntutan balas. Sekalipun pencukaian berjaya, kos tidak akan dapat mencapai angka dalam jumlah penghakiman. Selepas mencapai kesimpulan bahawa penentang tidak mampu membayar hutangnya, adalah tidak perlu untuk mempertimbangkan pengataan bahawa hutang dipertikaikan. Bagaimanapun, mahkamah telah mempertimbangkan pengataan dan menolak segala tuntutan demikian (lihat ms 507E–F, 508A, 509H–I dan 510C–E).

(2) Jelasnya, pempetisyen telah diberikan kebebasan untuk memfailkan semula dan ia telah pun berbuat demikian melalui petisyen ini (lihat ms 508D).

(3) Keputusan hakim dalam saman pemula tersebut tidak akan menjejaskan petisyen ini dalam apa cara pun. Walau bagaimanapun, biarpun satu perintah penggulungan dibuat, penentang boleh meneruskan saman pemula tersebut menerusi penyelesai sementara (lihat ms 509G).]

Notes

For cases on inability to pay debts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 433–468.

Cases referred to

Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 100 (refd)

Weng Wah Construction Co Sdn Bhd v Yik Foong Development Sdn Bhd [1994] 2 MLJ 266 (refd)

Legislation referred to

Companies Act 1965 s 218(1)(e), (i), (2)(a), (c)

Prasad Abraham (*FH Woon* with him) (*Prasad Abraham & Associates*) for the petitioner.

V Rajadevan (*Rajadevan & Associates*) for the respondent.

Cur Adv Vult

Kamalanathan Ratnam JC:

Facts

This petition was grounded on s 218(1)(e) and (i) of the Companies Act 1965 ('the Act'), that is on the basis of the respondent's inability to pay its debts due to the petitioner, and that therefore it was just and equitable that it be wound up.

The petitioner had granted loan facilities to the respondent and the respondent had failed to repay the same. The petitioner as a consequence entered judgment in default on 26 February 1987 against the respondent. The validity of the judgment for the purpose of execution has been extended. The respondent is indebted to the petitioner in the sum of RM4m as at 31 October 1986. The statutory notice of demand pursuant to s 218(2)(a) of the Act had been duly delivered to the respondent but there had been no response.

The court's findings

Since there had been no response from the respondent, it follows that there is a presumption of inability to settle the judgment by the respondent pursuant to the said statutory notice. Alternatively, s 218(2)(c) of the Act allows the petitioner to show as an alternative the presumption raised by the statutory notice of demand pursuant to s 218(2)(a) that on the evidence presented, the respondent company was unable to pay its debt (see *Weng Wah Construction Co Sdn Bhd v Yik Foong Development Sdn Bhd* [1994] 2 MLJ 266 at p 267). In support of the petition was annexed as Annexure C an affidavit affirmed by one Lingadass s/o Kumarasamy, the then executive director of the respondent who stated in that affidavit that as a result of various problems and in view of the recession which took place in Malaysia between 1985 and 1986, the respondent suffered severe cash flow problems and that as a result thereof the respondent was unable to meet its obligation to repay the same petitioner's term loan. Another affidavit, Annexure D, affirmed by Narayanan s/o T Achuthan Nair, the manager of the legal department of the petitioner, showed that the petitioner had even rescheduled the respondent's repayment obligations due to the respondent's inability to pay in accordance with the original repayment schedule, but even then the respondent could not keep up with its repayment obligation and continued to be in default and ceased to make any payment since April 1988. These two Annexures C and D were filed in respect of an earlier Winding-Up Petition No D2–28–127–91 ('the D2 petition') which was dismissed with liberty to file afresh. The respondent is in a precarious position because all its initial directors, when the loan was first disbursed, are now bankrupts. In all the like circumstances, I cannot but concur with

the petitioner's submission that the respondent is truly and clearly unable to pay its debt. A

The earlier winding-up proceedings (the D2 petition)

By way of encl 9, a director of the respondent, Mary Fabiola a/p GP Gomez ('Fabiola'), affirmed an affidavit on 22 May 1996 that the petitioner B herein is estopped from filing the present petition on the ground of res judicata. It was averred that the D2 petition was argued and that the learned judge had dismissed the said petition with costs on the grounds that the respondent had a bona fide cross-claim against the petitioner. A copy of Siti Norma Yaakob J's (as she then was) judgment was annexed as C an exhibit. Upon a study of her judgment I note and I quote the last paragraph which reads:

> For the above reasons, I had dismissed the petitioner's petition with costs with liberty given to the petitioner to file afresh.

Clearly the petitioner has been given the liberty to file afresh and which it D has done by way of this petition.

The cross-claim

The cross-claim which the respondent relied on was in respect of a civil suit filed by the respondent against the petitioner by way of Kuala Lumpur E High Court Civil Suit No D3–22–1223–91 ('the D3 suit') and in her affidavit affirmed on 22 May 1996, the said director maintained that the said D3 suit was pending. The D3 suit was the respondent's claim for damages for trespass as a result of the petitioner's wrongful appointment of receivers and managers over the respondent. F

By way of encl 16, the same Narayanan s/o Achuthan Nair affirmed an affidavit on 19 June 1996 on behalf of the petitioner wherein he stated that soon after the defence was filed in the D3 suit, the petitioner instructed its solicitors to file an application for a declaration that the then solicitors for the respondent (in the D3 suit) had no authority to act as the G respondent's directors at the material time (except for one) had been adjudicated bankrupts. Despite the claim by the respondent herein (in the D3 suit) that the said Fabiola had been appointed as director and therefore had the authority to instruct the solicitors, the learned senior assistant registrar ('the SAR') who heard the application on 19 August 1992 granted order in terms. Rather than appealing against the learned SAR's decision H the respondent (in the D3 suit) appointed a new firm of solicitors who sought a declaration from the court that they were entitled to act. The application was supported by an affidavit affirmed by Fabiola which repeated the same averments as in the earlier application. Since the status of Fabiola was in doubt as the documents filed with the Registrar of Companies still I showed the bankrupt directors as still being on the board, the court dismissed the respondent's solicitors application on 12 November 1992. The said order has been produced as exh C to encl 16.

From this decision, the respondent filled a notice of appeal to the judge in chambers. On 16 July 1993, the learned judge struck off the appeal with costs.

In the meantime, the petitioner now began to flex its muscles. It took the offensive and directed its solicitors to file an application to strike off the cross-claim (the D3 suit) on the basis that it was filed by solicitors who lacked authority to do so. On 20 September 1993, the learned judge, after hearing arguments and reading the various affidavits in support, granted the petitioner an order in terms of the application. The said draft order and notes of evidence have been annexed as exh E(i) and (ii) to encl 16. No appeal has since been filed against this order dated 20 September 1993.

It is my judgment that based on the facts which I have narrated in extensio, neither Fabiola nor the respondent has been candid towards this court in respect of the existence of the cross-claim.

The Ipoh High Court Originating Summons No 24–574–89

The petitioner filed an originating summons in the Ipoh High Court seeking a declaration that it was entitled to sell off machinery belonging to the respondent but charged to the petitioner under a fixed charge pursuant to a debenture. This was necessitated by the fact that the appointment of the receiver and manager had been declared null and void, and under a fixed charge, the petitioner contended it had a residual power of sale. An order of sale was obtained and the machinery was sold for RM115,000. The respondent set aside the order for sale on the ground of improper service of the originating summons but the originating summons and the affidavit in support remained to be reserved and reheard. The said order has been exhibited as exh J to encl 16. The respondent then filed a summons in chambers for damages and for the proceeds of sale to be paid back to the respondent. The learned judge after hearing arguments made no order on the respondent's application, save for the proceeds of sale to be deposited with the petitioner's solicitors as stakeholders and the originating summons to be heard on its merits.

It is my finding that the decision in the Ipoh High Court will not in any way affect the present petition. In any event, even if a winding-up order is made, the respondent can continue the originating summons through the provisional liquidators.

Order for winding up

On the question of winding up, I am satisfied that the respondent is impecunious and is unable to pay its debt and that it is just and equitable that it be wound up. The petitioner is seized of a valid and enforceable judgment against the respondent for RM4m and this judgment has not been set aside nor appealed against. There is at present no existing cross-claim against the petitioner. In the Ipoh suit, it is the petitioner who is making the application and there is no counterclaim or cross-claim by the respondent in those proceedings. In *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100, the (then) Surpreme Court held that

even a supporting creditor was entitled to rely on an in default judgment, which, until set aside, has to be considered as a good and enforceable judgment, as a basis for its right to be a supporting creditor and that the said supporting creditor should be recognized in the petition as a supporting creditor. In the present case, the petitioner itself has obtained this judgment in default which has not as yet been set aside. The respondent's cross-claim too had been struck out with costs and yet there has been no appeal against the said order nor is there an application to set it aside.

The respondent's argument that it has not as yet taxed the costs of the striking out of the earlier D2 petition is neither here nor there. Since the costs have not been taxed, I cannot even consider this even remotely as a cross-claim. Further, even on a successful taxation, the costs could never reach the figure in the judgment sum.

In so far as the court has discretion based on the earlier related facts as to whether or not a winding-up order should be made, there appears to be no reasonable or realistic basis which would warrant exercising my discretion in favour of the respondent. In fact, the far from candid approach taken by the respondent and its principal officer would tend to show that the respondent did not come clean before this court.

In any event, having reached the conclusion that the respondent is unable to pay its debts and on the respondent's own admission that it is unable to pay its debts, I do not see the purpose nor the need to consider its allegation that its debt is in dispute. However, in any case, I have considered its allegations of the debt being in dispute and have rejected all such claims.

Having read the submissions and all the cases submitted by both parties I ordered that:

(a) the respondent be wound up;

(b) the official receiver be appointed as provisional liquidator of the respondent; and that

(c) the petitioner and all supporting creditors be allowed the costs of and incidental to the winding up to be taxed by proper officer of the court and paid by the provisional liquidator out of the assets of the respondent.

Order accordingly.

Reported by Jafisah Jaafar